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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 151

EDWARD NASON,

Petitioner,

—against—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-captioned case on April 29, 1968, whereby petitioner was ordered deported.

Citations to Opinions Below

The opinion and judgment of the Court of Appeals of April 29, 1968 is as yet unreported and is printed as Appendix A hereto, *infra*, p. A1. The previous opinion of the Court of Appeals in this matter, which reversed the Board of Immigration Appeals and remanded the case, is reported as *Nason* v. *Immigration and Naturalization Service,* 370 F. 2d 865 (1967), and is printed as Appendix B hereto, *infra,* p. A10.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on the 29th day of April, 1968. By an order dated May 15, 1958, the Circuit Court stayed its mandate, which would otherwise have issued on May 13, 1968, pending the filing of a petition for a writ of certiorari by and including June 14, 1968. The jurisdiction of this Court is invoked under Title 28 of the United States Code, section 1254(1).

Questions Presented

1. Were the petitioner's constitutional rights denied by the failure of the Immigration and Naturalization Service to advise him of his right to counsel at a preliminary or investigatory hearing to which petitioner was summoned by written request for the sole purpose of eliciting a statement later to be used against him in deportation hearings as the Service's major piece of evidence to support its burden of proving petitioner deportable? Should not this court, in view of its decision this term in *Mathis* v. *United States,* May 6, 1968 (36 Law Week 4379), reverse the conclusion of the Circuit Court in its first opinion herein (at p. 867) that "petitioner was not entitled to have a lawyer present at the preliminary interrogation and that it was not error to fail to advise him that he had a right to counsel or to receive in evidence at the hearing his sworn statement made at the preliminary interrogation"?

2. Even if petitioner had no right to counsel at such preliminary hearing, did the Service meet its burden of proving deportability "by clear, unequivocal and convincing evidence" when it placed crucial reliance on petitioner's answers at such hearing to questions conclusory

of the legal issue (whether the two crimes for which he was convicted arose out of "a single scheme of criminal misconduct") where petitioner was never advised of the significance of that phrase and where he did not have the benefit of counsel to safeguard his right not to incriminate himself?

Constitutional and Statutory Provisions Involved

The Fifth Amendment to the Constitution of the United States provides:

> "No person . . . shall . . . be deprived of life, liberty, or property, without due process of law . . ."

Section 235 (a) of the Immigration and Nationality Act of 1952, 8 U.S.C. section 1225 (a), provides in relevant part:

> ". . . The Attorney General and any immigration officer, including special inquiry officers, shall have power to administer oaths and to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, reenter, pass through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this chapter and the administration of the Service, and, where such action may be necessary, to make a written record of such evidence."

Section 241(a)(4) of the Immigration and Nationality Act of 1952, 8 U.S.C. section 1251(a)(4), provides:

> "Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who—

(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;"

Section 242(b) of the Immigration and Nationality Act of 1952, 8 U.S.C. Section 1252(b), which concerns the deportation hearing, provides in relevant part:

"(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;"

Section 287(a)(1) of the Immigration and Nationality Act of 1952, 8 U.S.C. section 1357(a)(1), provides in relevant part:

"Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—

(1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;"

Section 292 of the Immigration and Nationality Act of 1952, 8 U.S.C. section 1362, provides:

"In any exclusion or deportation proceedings before a special inquiry officer and in any appeal proceedings before the Attorney General from any such exclusion or deportation proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such

counsel, authorized to practice in such proceedings, as he shall choose."

Section 1341 of Title 18 of the United States Code provides:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

Statement

Petitioner Edward Nason, who is a native and citizen of Canada, now 31 years old and employed as a bookkeeper, was admitted to the United States for permanent residence on April 29, 1961. His only living relative, his mother, was admitted to such residence shortly thereafter. On April 9, 1965, petitioner pleaded guilty to six counts of a twelve count information in the United States District Court for the Southern District of New York, charging him with de-

vising a scheme to defraud by use of the mails in violation of section 1341 of Title 18 of the United States Code, for the period from November 1, 1962 through December 31, 1962, and for the period from October 2, 1963 through October 24, 1963. During the first period, petitioner rented a post office box at the Grand Central office under the fictitious name of "Charles C. Cole", and during the second period he rented a box at the same station under the fictitious name of "Peter Hughes". During both periods, he ordered various minor items of merchandise, such as books and clothing accessories, and "paid" for them by worthless checks signed with the fictitious names.

Upon his plea of guilty, petitioner was convicted of two frauds. He was given a suspended sentence and placed on probation for two years, from which he has been discharged.

On June 15, 1965, in response to a written request from the Immigration Service, petitioner appeared at the New York Office of the Service and answered a series of questions put to him by an investigator (hereinafter the "preliminary hearing"). He was advised that whatever he said might be used against him in Service proceedings. Petitioner was not accompanied by a lawyer. At no time during the preliminary hearing was he advised that a lawyer could be present or asked if he wished to obtain a lawyer to represent him. The record of this preliminary hearing (hereinafter the "sworn statement") was taken on a dictabelt, which petitioner signed. He was not afforded an actual transcript until the deportation hearing.

At the preliminary hearing, petitioner was asked questions predicated on the existence of two schemes of criminal misconduct. For example (ST. 4*):

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* Numbers in parentheses preceded by ST. refer to the transcript of the sworn statement taken at the preliminary hearing and filed as part of the record with this court.

"Q. Now, taking this single scheme into consideration, you found that it operated successfully during that period of time?

* * *

Q. Was that scheme operating successfuly, and if it was, what caused you to discontinue that scheme?"

Moreover, he was asked to state directly that the two frauds for which he was convicted constituted different schemes of criminal misconduct. Thus (ST. 5-6):

"Q. At the time you were conducting this scheme under the name PETER HUGHES, did you connect this in any way, in your own mind, as being the *same scheme of misconduct* that you were following when you were using the name of CHARLES COLE? (Emphasis added).

Q. But you were using a different scheme at a different time. Is that correct?"

At no time during the preliminary hearing was the phrase "single scheme of criminal misconduct" or the word "scheme" explained to petitioner; nor was he told that proof as to two separate schemes of criminal misconduct would support a legal ground for his deportation.

On July 9, 1965, deportation proceedings were instituted against petitioner by the service of a notice of hearing and order to show cause pursuant to Section 241(a)(4) of the Immigration and Nationality Act, in that he was after entry into the United States "convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct". A hearing before a Special Inquiry Officer was held on August 6, 1965, at which petitioner was represented by counsel. The Service introduced into evidence petitioner's visa, his record of conviction and the

sworn statement taken at the preliminary hearing (TR. 4-5)*. Petitioner's motion to strike the sworn statement from the record was denied (TR. 8-9). Petitioner offered evidence in his own defense.

Petitioner was ordered deportable and on June 2, 1966, the Board of Immigration Appeals denied his appeal from this order. On petition to the Court of Appeals for the Second Circuit, the Court found "petitioner was not entitled to have a lawyer present at the preliminary interrogation and that it was not error to fail to advise him that he had a right to counsel or to receive in evidence at the hearing his sworn statement made at the preliminary interrogation" (370 F. 2d 865, 867). However, the Court agreed with petitioner that the Board had not appraised the evidence in accordance with "the standards required in deportation proceedings", and therefore it reversed the Board and remanded the case.

On remand to the original Special Inquiry Officer, petitioner was again found deportable. His appeal was denied by the Board of Immigration Appeals on September 29, 1967. On the petition therefrom to the Circuit Court, petitioner contended that the Board failed to apply the estiblished test to determine the existence of a "single scheme of criminal misconduct", relying erroneously on *Costello* v. *Immigration and Naturalization Service,* 311 F. 2d 343, 348 (2d Cir., 1962), and that the Board's finding was not supported by "clear, unequivocal and convincing evidence" since the Board and the Special Inquiry Officer had relied crucially on petitioner's sworn statement given at the pre-

* Numbers in parentheses preceded by TR. refer to the transcript of the deportation hearing and filed as a part of the record with this court.

liminary hearing in the absence of counsel. In his brief and in oral argument to the Circuit Court, petitioner reserved his right to present to this court the correctness of the Circuit Court's prior ruling that "petitioner was not entitled to have a lawyer present at the preliminary interrogation and that it was not error to fail to advise him that he had a right to counsel or to receive in evidence at the hearing his sworn statement made at the preliminary interrogation". The petition was dismissed by the Circuit Court on April 29, 1968, from which petitioner here prays for a writ of certiorari.

Reasons for Granting the Writ

A. The Fifth Amendment to the United States Constitution requires that petitioner be advised of his right to counsel at a preliminary hearing conducted by the Immigration Service the sole purpose of which is to secure petitioner's statement to be introduced at a deportation hearing as the major piece of evidence in support of the Service's burden of proving deportability.

Although the deportation proceeding has been held by this court to be civil and not criminal in character (*Woodby* v. *Immigration and Naturalization Service,* 385 U.S. 276 (1966); *Harisiades* v. *Shaughnessy,* 342 U.S. 580 (1952), the seriousness of the penalty, one akin to banishment from home, family and job, recently led this court in *Woodby* (at 286) to require the Service to prove deportability by the quasi-criminal standard, that of "clear, unequivocal and convincing evidence". The seriousness of the penalty of deportation must likewise compel assurance of an alien's constitutional right not to incriminate himself—a right which can only be guaranteed by the opportunity to obtain

counsel at *every* stage in the deportation process, including the preliminary or investigative stage where the Service seeks to obtain from the alien the crucial evidence it will rely on at the deportation hearing to meet its heavy burden of persuasion. The self-incrimination and counsel privileges guaranteed by the Constitution go hand in hand, for it is the latter which assures maintenance of the former. Therefore, the Fifth Amendment must implicitly assure in a civil proceeding such as deportation that which the Sixth Amendment expressly dictates in criminal matters.*

The Immigration and Nationality Act provides (sections 242(b) and 292) that at the deportation hearing before a special inquiry officer the alien shall have the privilege of being represented by such counsel as he shall choose, at no expense to the Government. Although the Act affords the Service the general power to make investigations and question an alien as to his right to be in the United States (section 287(a)(1)) and to take and consider evidence from any person as to the privilege of an alien to enter or reside in the United States or on any matter relevant to the enforcement of the Act (section 235(a)), there are no statutory references to right to counsel or other constitutional rights at any such investigation.

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* It was noted by Chief Justice Traynor of the Supreme Court of California that *Escobedo* v. *Illinois*, 378 U. S. 478 (1964) could just as well have been decided, and perhaps better decided by this court, pursuant to the mandates of the Fifth Amendment. "The Devils of Due Process in Criminal Detection, Detention, and Trial", 21 RECORD ASS'N. BAR CITY OF N.Y. 375, 369-73 (June, 1966).

Petitioner contends that where, as here, a preliminary investigation is held for the sole purpose* of eliciting testimony from an alien to be used against him in evidence by the Service to prove his deportability, such investigation must be considered an integral part of the deportation proceeding to which constitutional guarantees apply directly and by virtue of the relevant protective provisions of the Immigration and Nationality Act (*supra*). Petitioner disagrees with the view of the Circuit Court equating such an investigation with a routine investigation of an alien (370 F. 2d 865, 868), often conducted by an officer of the Service pursuant to general statutory power (*supra*) to ascertain a change of name, address or marital status. The one is looking toward the procuring of evidence from an alien (whose criminal record has been notified to the Service by the convicting court) to be used against him in a subsequent deportation hearing; the other is merely to assure the proper administration of the Act. This is clear in practice, for the interrogation in the two instances differs according to the purpose of the inquiry. In the first instance, the hearing is almost always recorded, and, as a matter of Service practice, the alien is usually warned that anything he says may be used against him (although no statutory provision or regulation compels this advisement). In the second instance, the hearing is informal, unrecorded and the alien is usually not advised as to his rights. See *Gordon and Rosenfield, Immigration Law and Procedure* 5-11 (1966 ed.).

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* That the sole purpose of the preliminary hearing here was to adduce evidence in support of the Service's burden is demonstrated by the very questions put to petitioner (*supra* at 7), at a time when the petitioner was already regarded by the Service as a potential deportee by virtue of his criminal convictions.

This court in *Mathis* v. *United States* (May 6, 1968), decided that where the Government conducted a "routine tax investigation" of one in custody for another matter, the advisement of right to counsel was required since such investigation could and did lead to a criminal prosecution. The preliminary hearing by the Service here was intended to supply evidence for a deportation hearing, and could and did lead to such deportation hearing. Although petitioner was not in custody at the time of the preliminary hearing, he appeared in response to a written request by the agency of Government which alone can supervise all details of his life and require him, on pain of deportation, to report even such matters as change of marital status or address. What alien would not respond to such request? The logic of *Mathis* compels a similar result here.

It is submitted that this court should decide an important question of constitutional and federal law applicable to virtually all Immigration Service investigations preliminary to deportation proceedings, a question which has not been settled by this court.*

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* This court, in *Bilokumsky* v. *Tod*, 263 U.S. 149, 155-56 (1923), concerning an alien questioned as to his alienage without benefit of counsel while in a city prison, held that in the absence of regulation, there was no obligation to advise the alien as to the self-incrimination and right to counsel privileges during the preliminary investigation. This court noted, however, that since the fact of alienage was independently provable in any event, lack of such advisements did not result in a denial of justice. The case is thus distinguishable from the present matter, and even if not so distinguishable, would no longer be controlling in view of this court's many decisions since 1923 more expansively interpreting the Fifth Amendment.

B. The Service did not meet its burden of proving deportability "by clear, unequivocal and convincing evidence" in that it relied on petitioner's sworn statement taken in the absence of counsel and in response to incriminating and conclusory questions of law.

In determining whether the two crimes for which petitioner was convicted arose out of a "a single scheme of criminal misconduct" within the meaning of Section 241(a)(4) of the Immigration and Nationality Act, applicable federal law requires that where there is evidence as to similarity of method, intent, techniques, time, place and manner of execution, purpose and victims, all such evidence must be weighed.* It was on this point that the Circuit Court originally reversed and remanded the case to the Board of Immigration Appeals for its failure to weigh all such evidence in the record.

Here, admittedly, there is a nine month period of time separating the two crimes for which petitioner was convicted, crimes which are otherwise basically similar in all respects. To establish that such crimes did not arise out of a single scheme of criminal misconduct, the Service asked petitioner, in the absence of counsel, to so state, and put a host of questions to him which presumed the existence of two separate schemes. At no time was petitioner told the

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* *Sawkow* v. *Immigration and Naturalization Service*, 314 F. 2d 34 (3d Cir., 1963); *Wood* v. *Hoy*, 266 F. 2d 825 (9th Cir., 1959); *Barrese* v. *Ryan*, 203 F. Supp. 880 (D. Conn., 1962); *Zito* v. *Moutal*, 174 F. Supp. 531 (N.D. Ill., 1959); *Jeronimo* v. *Murff*, 157 F. Supp. 808 (S.D.N.Y., 1957). The Circuit Court agreed with petitioner that *Costello* v. *Immigration and Naturalization Service, supra* on which the Service and the Board relied, was applicable only in "the absence of any admissible and relevant evidence other than the records of conviction", 370 F. 2d 865, 869; opinion, Appendix A at 2048.

significance of "scheme" or "scheme of criminal misconduct". Yet, he was with insistence asked (ST. 5):

> "Q. But you were using a different scheme at a different time. Is that correct?"

Both the Board of Immigration Appeals and the Circuit Court relied on petitioner's sworn statement. The Circuit Court noted (Appendix A at 2048), ". . . the Board had before it the testimony of the petitioner already referred to, which tended to corroborate the reasonable inference to be drawn from the conviction record in this case."

If petitioner's sworn statement is eliminated from consideration or given little weight, there is an abundance of evidence as to similarity of method, intent, purpose, victims and plan deriving from the facts of the crimes themselves and from evidence given at the deportation hearing. Such evidence must be balanced against the time gap of nine months between the crimes. Petitioner contends that such balancing does not afford a sufficient load to support the Service's heavy burden of persuasion in deportation matters, and that such burden was not met here.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

RITA E. HAUSER
Attorney for Petitioner

June 1968

APPENDIX A

Opinion and Judgment of the United States Court of Appeals, April 29, 1968

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 413—September Term, 1967.

(Argued April 10, 1968 Decided April 29, 1968.)

Docket No. 31864

EDWARD NASON,

Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Before:

LUMBARD, *Chief Judge,*
WATERMAN and KAUFMAN, *Circuit Judges.*

Petition for review of a final order of the Board of Immigration Appeals ordering petitioner deported as an alien who has been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct, within the meaning of Section 241(a)(4) of the Immigration and Nationality Act, 8 U. S. C. §1251(a)(4). Petition dismissed.

RITA E. HAUSER, New York, N. Y., *for petitioner.*

FRANCIS J. LYONS, Special Assistant United States Attorney (Robert M. Morgenthau, United States Attorney, Daniel Riesel, Special Assistant United States Attorney, on the brief), *for respondent.*

Appendix A—Opinion and Judgment of the United States Court of Appeals, April 29, 1968

KAUFMAN, *Circuit Judge*:

Petitioner has been ordered deported to Canada by the Board of Immigration Appeals as an alien who has been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct. Immigration and Nationality Act, §241(a)(4), 8 U. S. C. §1251(a)(4).

In a prior petition to this Court, Nason contested an earlier order of deportation by the Board on the ground, *inter alia,* that the Board had not decided the issues before it on the record as a whole. We agreed with petitioner (one judge dissenting), reversed the Board and remanded the case for a determination on the entire record. *Nason v. Immigration and Naturalization Service,* 370 F. 2d 865 (1967). On remand, the special inquiry officer, in the first instance, and later the Board of Immigration Appeals, considered the record as a whole, including petitioner's own testimony and once again concluded that petitioner was deportable under §241(a)(4).

Nason now contends that the order of deportation should be set aside because the Board of Immigration Appeals allegedly applied an improper standard in determining whether the crimes were part of a "single scheme of criminal misconduct" within the meaning of §241(a)(4) and because the Board's finding of deportability was not supported by clear, convincing and unequivocal evidence. This time we find ourselves in agreement with the Board. We do not believe that the Board improperly applied the statutory test to the facts of this case, and we find that the Board's decision is adequately supported by the record.

The crimes for which petitioner stands convicted involved two periods of mail fraud activity separated by

an interval of over nine months.[1] During the period November 1 through December 31, 1962, Nason rented a Post Office box in the fictitious name of "Charles C. Cole" and ordered various items of merchandise, which were then delivered to that box and "paid" for by worthless checks signed "Charles C. Cole." Nason resumed his mail fraud activity during the period October 2 through October 24, 1963, this time by renting a Post Office box in the fictitious name "Peter Hughes." The scheme and method of operation were similar in both cases and Nason succeeded in defrauding such companies as Doubleday & Co., Macy's, B. Altman and the Curtis Publishing Co. during the two periods in question.

In support of his contention that the crimes arose out of a "single scheme of criminal misconduct," petitioner stresses the basic similarity between the two crimes. He urges that except for the use of a different fictitious name, the crimes in every other respect were identical: his intent and purpose were the same, as was his mode of operation; the merchandise ordered was of a similar type and the victims in both cases were publishing houses and various New York City department stores. Such evidentiary facts, Nason argues, are properly to be considered on the issue

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[1] Petitioner pleaded guilty on April 9, 1965, in the United States District Court for the Southern District of New York, to three counts of an information charging that he unlawfully, wilfully and knowingly devised a scheme to defraud, by use of the mails, during the period from November 1, 1962 through December 31, 1962, in violation of 18 U. S. C. §1341. At the same time, Nason pleaded guilty to three additional counts of the same information charging him with devising a similar scheme, in violation of the same section, during the period from October 2, 1963 through October 24, 1963. The petitioner does not dispute the fact that the crimes upon which he stands convicted involve moral turpitude.

A fuller discussion of the facts may be found in our earlier opinion in this case, *Nason v. Immigration and Naturalization Service*, 370 F. 2d 865 (1967).

of the existence of a "single scheme" under the rule of *Jeronimo* v. *Murff*, 157 F. Supp. 808 (S. D. N. Y. 1957) and cases which follow the *Jeronimo* rule.[2] The Board, petitioner charges, perversely ignored *Jeronimo*, and failed to give adequate consideration to the basic similarity between the two crimes, choosing instead to rely upon this Court's dictum in *Costello* v. *Immigration and Naturalization Service*, 311 F. 2d 343, 348 (1962), which rejected any equation of the statutory phrase "single scheme of criminal misconduct" with the notion of a "common scheme or plan."

We are of the view that petitioner's reliance on *Jeronimo* is clearly misplaced. Although the Board endorsed the *Costello* dictum as a correct statement of the law, the record is barren of the slightest indication that the Board failed to give due consideration to the basic similarity between the two crimes,[3] or to petitioner's testimony attempting to relate the two separate periods of mail fraud activity. Indeed, the contrary is true.

It was uncontroverted that the two crimes were separated by a span of over nine months. Although Nason testified that he had originally intended to use several fictitious names and accounts over an extended period of time, he could not recall these other names at the hearing; moreover, when asked why he had failed to use the other names, petitioner answered, "I was apprehended." There

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[2] *Sawkow* v. *Immigration and Naturalization Service*, 314 F. 2d 34 (3d Cir. 1963); *Wood* v. *Hoy*, 266 F. 2d 825 (9th Cir. 1959); *Barrese* v. *Ryan*, 203 F. Supp. 880 (D. Conn. 1962); *Zito* v. *Moutal*, 174 F. Supp. 531 (N. D. Ill. 1959).

[3] The Board noted specifically the contrast between the facts of the present case and those involved in *Jeronimo* where ". . . the period of time charged in the first count encompassed the periods of time of the acts charged in every one of the other counts, and all the acts constituted parts of a common scheme and plan."

was no evidence whatsoever, that petitioner had engaged in mail fraud activity or used any other fictitious names during the nine months which intervened between the first and second crimes. Nason also denied specifically that at the time he formed his original intention he envisioned pursuing the crime, ceasing his activities, and then resuming his mail fraud manipulations. On the contrary, when asked why he had discontinued his activity under the name of "Charles C. Cole," petitioner explained that he had obtained all the merchandise he desired during that particular period.

The Government, admittedly, bears a heavy burden of proof in a deportation case: its case must be established by "clear, unequivocal and convincing evidence," a test approaching that in a criminal case of proof "beyond a reasonable doubt." *Woodby* v. *Immigration and Naturalization Service,* 385 U. S. 276 (1966). In a case arising under §241(a)(4) of the Immigration and Nationality Act, it is part of the Government's burden to establish that the convictions did not arise out of a single scheme of criminal misconduct. *Wood* v. *Hoy,* 266 F. 2d 825 (9th Cir. 1959); *Zito* v. *Moutal,* 174 F. Supp. 531 (N. D. Ill., 1959). That burden has been met here. Viewing the evidence in a light most favorable to Nason, the most that can be claimed is that at the time he commenced his criminal activity he harbored a general intention or expectation that he would repeat the crime at some indefinite time in the future. By petitioner's own admission, the nine-month interlude between the first and second periods of criminal activity was not anticipated and did not form an integral part of petitioner's scheme to defraud through use of the

mails. Petitioner terminated his first period of criminal activity simply because he had acquired all he wanted.

In *Costello, supra,* we held that where the acts constituting the commission of two crimes are separated by a substantial interval of time, a special inquiry officer of the Immigration and Naturalization Service would be required to find that an alien had been convicted of two crimes not arising out of a single scheme of criminal misconduct, in the absence of additional facts to support an inference that the two crimes were related. 311 F. 2d at 347. In the present case there was evidence, other than the record of convictions, which was relevant to the issue of whether more than one scheme existed, and which, as we held when this case was first here for review, the Board was required to consider. Beyond the record of conviction here, which itself supports a strong inference that the two periods of criminal activity, separated by nine months, did not arise out of a single scheme of criminal misconduct, the Board had before it the testimony of the petitioner already referred to, which tended to corroborate the reasonable inference to be drawn from the conviction record in this case. Against this, the record merely contained Nason's assertion that he originally contemplated repeating the crime, using other fictitious names, at some indefinite time in the future.[4] The Board did not consider such a general

[4] As indicated, we have considered the record evidence in a light most favorable to petitioner. It should be noted, however, that the special inquiry officer who conducted the original deportation hearing and who had an opportunity to hear and observe Nason did not find him a credible witness. He could well have concluded that the facts supported the more reasonable view that petitioner decided that his successful venture nine months earlier warranted repetition. Cf. *Chanan Din Khan* v. *Barber*, 147 F. Supp. 771, 774 (N. D. Cal. 1957).

intention to repeat a crime similar in character at some indefinite time in the future enough to constitute the two distinct crimes a "single scheme of criminal misconduct" within the meaning of §241(a)(4). We are in agreement.

It is generally conceded that in enacting the 1952 Act, Congress intended to facilitate the deportation of undesirable aliens. Cf., *Chanan Din Khan* v. *Barber,* 147 F. Supp. 771, 773 (N. D. Cal. 1957). Although there is no meaningful legislative history to illumine the meaning of the specific statutory language "two crimes . . . not arising out of a single scheme of criminal misconduct," we think it evident from the statute itself that Congress intended this restriction to operate so that a one-time alien offender would be afforded a second chance before he could be deported. Deportation for misconduct, as the Supreme Court noted in *Fong Haw Tan* v. *Phelan,* 333 U. S. 6, 10 (1948), is a drastic penalty. The alien's stake is, therefore, considerable. Congress, consequently, reserved deportation for those who, having completed a criminal scheme, proceeded to commit a fresh crime or to renew the prior course of criminal conduct.

The statutory language, "a single scheme of criminal misconduct," is not so narrow as a single criminal act or transaction. See *Wood* v. *Hoy,* 266 F. 2d 825 (9th Cir. 1959); *Zito* v. *Moutal,* 174 F. Supp. 531 (N. D. Ill. 1959). As Judge Hoffman noted in *Zito, supra,* "The duration of a criminal episode must vary with the nature of the offenses committed. Not every offense can be committed quickly and in one place." 174 F. Supp. 538. Petitioner's crimes, however, were separated by an interval of over nine months and, as petitioner revealed by his own testimony,

the nine month hiatus was not integral to his original scheme.[5]

Petitioner's nebulous intention to repeat his crime with the same or other victims some day in the indefinite future, will not bridge the gap of nine months. The word "scheme" implies a specific, more or less articulated and coherent plan or program of future action, much more than a vague, indeterminate expectation to repeat a prior criminal *modus operandi*. As used in the statute, "scheme" is not to be construed as an abstract concept or strategy capable of future application at any time and any place, but planned definitely for none. It is here, especially, that Nason's stress on the similarity between the two crimes misses the mark. It should be noted that the statute does not speak in terms of a "common scheme or plan." The impropriety of such a test is readily apparent for it could be invoked to save an alien who repeated a successful crime already tried and had the good fortune to employ not only the same methods, but also to have chosen the same or a similar victim. Congress meant to give the

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[5] As a minimum standard, the Board of Immigration Appeals has suggested that

> "The least that would appear to be required is the existence of a purpose so definite and limited in scope, both as to amount and as to time, place and manner of execution, as to make it reasonably probable that the very crimes for which the respondent stands convicted would be the ones which he would commit." *Matter of Vosganian*, Int. Dec. 1676 (Board of Immigration Appeals, 1966).

That test, if sensibly applied, would seem to be in harmony with the Congressional purpose. A reasonable probability test would shelter both the case of multiple crimes arising out of the same act or transaction and the case of the successive series of uninterrupted and connected crimes, thus preserving for the alien the second chance which Congress intended to give him.

alien a second chance, not to spare the recidivist. See *Costello, supra,* 311 F. 2d at 348. Under the circumstances of this case, petitioner cannot with grace urge that he was not given that second chance.

To be sure, evidence of the similarity of two crimes in terms of intent, motive, purpose, techniques, similarity of victims and the like may often be significant on the issue of the existence of a "single scheme," especially in serial crimes. Such evidence may establish that what appeared at first blush as separate and distinct crimes may, indeed, have been spawned by a single criminal scheme. But, it does not have that conclusive significance so that it could, by itself, outweigh other overwhelming evidence that the two crimes were unrelated. Since the evidentiary test laid down in *Jeronimo* v. *Murff, supra,* relied on by petitioner, does not appear to go beyond what we have said here, we do not consider it inconsistent with our holding in this case.

The decision of the Board of Immigration Appeals finding petitioner an alien deportable under §241(a)(4) of the Immigration and Nationality Act was not erroneous and we accordingly dismiss the petition.

APPENDIX B

Opinion of the United States Court of Appeals, January 10, 1967

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 180—September Term, 1966.

(Argued November 16, 1966 Decided January 10, 1967.)

Docket No. 30623

EDWARD NASON,

Petitioner,

—against—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Before:

LUMBARD, *Chief Judge,*
MEDINA and KAUFMAN, *Circuit Judges.*

Edward Nason petitions for review of an order of the Immigration and Naturalization Service finding him deportable under 8 U. S. C., Section 1251(a)(4). Reversed and remanded.

RITA E. HAUSER, New York, N. Y., *for petitioner.*

FRANCIS J. LYONS, Special Assistant United State Attorney, New York, N. Y. (James G. Greilsheimer, Special Assistant United States Attorney, and Robert M. Morgenthau, United States Attorney for the Southern District of New York, New York, N. Y., on the brief), *for respondent.*

Appendix B—Opinion of the United States Court of Appeals, January 10, 1967

MEDINA, *Circuit Judge*:

Petitioner Edward Nason seeks review of a finding by the Immigration and Naturalization Service that he is deportable under 8 U.S.C., Section 1251(a)(4) for having been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal conduct.

The petitioner is a native and citizen of Canada, who was last admitted to the United States for permanent residence on April 29, 1967. On April 9, 1965, he pleaded guilty to three counts of an information in the United States District Court for the Southern District of New York for unlawfully, wilfully and knowingly devising a scheme to defraud by use of the mails during the period from November 1, 1962 through December 31, 1962, in violation of 18 U.S.C., Section 1341. On the same day he also pleaded guilty to three additional counts of the same information, for devising a similar scheme, in violation of the same section, during the period from October 2, 1963 through October 24, 1963. The frauds charged in the three counts covering the period from November 1, 1962 through December 31, 1962 were effected by renting a Post Office Box using the fictitious name "Charles C. Cole" and ordering various items of merchandise that were delivered to the Post Office Box and "paid" for by worthless checks signed "Charles C. Cole." A similar scheme was charged in the three other counts covering the period from October 2, 1963 through October 24, 1963, by the use of the fictitious name "Peter Hughes." Upon his plea of guilty on these six counts petitioner was given a suspended sentence and

placed on probation for two years. Each of these crimes involved fraud and hence moral turpitude within the meaning of 8 U. S. C., Section 1251(a)(4).

On June 15, 1965, more than two months after his conviction, petitioner appeared at the Immigration and Naturalization Service office voluntarily and was questioned by an investigator of the Service. Prior to the commencement of the questioning the investigator advised the petitioner:

> "I desire to take a statement from you concerning a matter of interest to this Service. You are advised that such a statement should be entirely voluntary and that whatever you say may be used against you or any other person in any Service proceedings."

The investigator then asked petitioner, "Do you understand and are you willing to make that statement at this time?", and petitioner responded, "Yes, sir."

When he appeared before the investigator, petitioner was not accompanied by a lawyer, he did not request an opportunity to consult a lawyer, nor was he advised that a lawyer could be present. He was under no restraint of any kind and was free to terminate the interrogation at any time and leave.

On July 9, 1965 deportation proceedings were instituted and on August 6, 1965 a hearing was had before a special inquiry officer, as provided in 8 U. S. C., Section 1252(b). He was then represented by counsel. Petitioner was adjudged deportable and, on June 2, 1966, the Board of Immigration Appeals dismissed his appeal.

Appendix B—Opinion of the United States Court of Appeals, January 10, 1967

On this challenge to the validity of the deportation order petitioner claims: (1) that he was entitled to have a lawyer present at the interrogation by the investigator, that he should have been advised of his right to have a lawyer present and that it was error to receive in evidence at the hearing before the special inquiry officer a copy of the transcript of his answers to the questions put to him by the investigator because of the failure to advise him of his right to have a lawyer present; and (2) that the Board of Immigration Appeals had adopted an improper and prejudicial method of appraising the evidence on the record as a whole.

We think petitioner was not entitled to have a lawyer present at the preliminary interrogation and that it was not error to fail to advise him that he had a right to counsel or to receive in evidence at the hearing his sworn statement made at the preliminary interrogation. However, we agree with petitioner's contention that the method of appraising the evidence by the Board of Immigration Appeals failed to measure up to the standards required in deportation proceedings and for that reason remand the case.

I

Although the consequences of deportation are in many instances of very serious moment to the deportee, a deportation proceeding has uniformly been held to be civil and not criminal in character. *Fong Yue Ting* v. *United States,* 149 U. S. 698 (1893); *Bugajewitz* v. *Adams,* 228 U. S. 585 (1913); *U. S. ex rel. Bilokumsky* v. *Tod,* 263 U. S.

149 (1923); *Harisiades* v. *Shaughnessy*, 342 U. S. 580 (1952); *Woodby* v. *Immigration and Naturalization Service*, —— U. S. ——, decided December 12, 1966. It is, moreover, within the competency of the Congress to prescribe rules and regulations affecting the fairness of a trial of disputed issues of fact, such as the burden of proof, the admissibility of evidence and the right of the deportee to counsel. In the absence of congressional action such questions have been traditionally "left to the judiciary to resolve * * * in the interest of the evenhanded administration of the Immigration and Nationality Act." *Woodby* v. *Immigration and Naturalization Service, supra.*

The statutory pattern governing this case seems to us to be clear. Thus 8 U. S. C., Section 1252(b)(2) provides, with respect to the hearing before the special inquiry officer: "The alien shall have the priviege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose."

This provision, however, has no application to proceedings conducted in pursuance of the broad investigatory powers of immigration officers. The statute provides that "any immigration officer" has the

> power to administer oaths and to take and consider evidence of or from any person touching the privilege of any alien * * * to enter, reenter, pass through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this chapter and the administration of the Service * * *. 8 U. S. C., Section 1225(a).

See also 8 U.S.C., Section 1357(a)(1).

Although the statute distinguishes between hearings before the special inquiry officer, where counsel is permitted, and investigatory hearings, no distinction is drawn among various types of investigations or between witness generally and witnesses who may subsequently become the object of Immigration and Naturalization Service action. As there is no provision for the attendance of counsel during the investigations of the Service, it follows, we think, that petitioner has no statutory right to counsel at the preliminary hearing.

The reason for allowing counsel at the hearing and not allowing counsel at the preliminary interrogation is not far to seek. At the investigatory stage, especially in matters affecting immigration involving relationships with foreign countries, the alien himself may be the principal source of information for the implementation of the Act. There are many other equaly cogent reasons of general application. The trial before the special inquiry officer is a different story.

Even if the principles of *Miranda* v. *Arizona*,[1] 384 U. S. 436 (1966) and *Escobedo* v. *Ilinois*, 378 U. S. 478 (1964) were applicable, and we think they are not applicable, still this would be of no help to this petitioner as he was not in custody or under any other compulsion or restraint when he answered the questions put to him by the investigator.

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[1] In the case before us the hearing was completed on August 6, 1965 and the order under review was entered on June 2, 1966, eleven days prior to June 13, 1966, the date of the decision in *Miranda*. See *Johnson, et al.* v. *New Jersey*, 384 U. S. 719 (1966).

The sum and substance of the matter is that petitioner made a purely voluntary statement and this statement was properly received in evidence by the special inquiry officer pursuant to 8 CFR 242.14(c).[2] The fact that petitioner was not represented by counsel at the taking of the statement does not affect its admissibility. *U. S. ex rel. Beck* v. *Neelly,* 202 F. 2d 221 (7 Cir. 1953), cert. denied 345 U. S. 997; *U. S. ex rel. Bilokumsky* v. *Tod,* 263 U.S. 149 (1923); *Landon* v. *Clarke,* 239 F. 2d 631 (1 Cir. 1957). Compare: *In Re Groban,* 352 U. S. 330 (1957); *Anonymous* v. *Baker,* 360 U. S. 287 (1959); *Ben Huie* v. *Immigration and Naturalization Service,* 349 F. 2d 1014 (9 Cir. 1965). See also *Ah Chiu Pang* v. *Immigration and Naturalization Service,* 3 Cir. Docket No. 15841, decided October 28, 1966 (*per curiam*).

II

We have no doubt that, subject to the issue of credibility and any questions of law relating to the interpretation of 8 U. S. C., Section 1251 (a)(4), petitioner was competent to give relevant testimony on the subject of whether these several plans to defraud arose or did not arise out of a single scheme of criminal misconduct. In *Costello* v. *Immigration and Naturalization Service,* 311 F. 2d 343 (2 Cir. 1962), reversed on other grounds, 376 U. S. 120 (1964), we concluded that in the absence of any admissible and

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[2] "*Use of Prior Statements.* The Special Inquiry Officer may receive in evidence any oral or written statement which is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing or trial."

relevant evidence other than the records of conviction (Costello did not testify), the special inquiry officer was required to find that the petitioner had been convicted of two crimes not arising from a single scheme of misconduct.

In the present case, by contrast, there was evidence, other than the record of convictions, which was relevant to the issue of how many criminal schemes existed. The procedural difficulty here arises from the fact that petitioner in his answers to the investigator made a number of admissions strongly corroborative of the inferences naturally to be drawn from the matter appearing on the face of the record of the convictions. With nothing else before it the special inquiry officer and the Board of Immigration Appeals could readily have made a finding, such as it could have made had the records of the convictions been the only evidence before them, to the effect that these separate crimes did not arise "out of a single scheme of criminal misconduct." And this we think would be true whether the burden of persuasion resting on the Government was to prove its allegations "by reasonable, substantial, and probative evidence" or "by clear, unequivocal, and convincing evidence," as recently held by the Supreme Court in *Woodby* v. *Immigration and Naturalization Service,* —— U. S. ——, decided December 12, 1966. But here, at the hearing before the special inquiry officer, petitioner more or less repudiated what he had said in his statement to the investigator, and gave testimony to the contrary. This made it necessary for the Board of Appeals to decide the issues on the record as a whole, and this is precisely what the Board did not do. Instead it ruled as follows:

> "However, the respondent has repudiated this statement of June 15, 1965 in which he stated there was no single scheme whereas in his testimony at the hearing he reverses himself under leading questioning of counsel and asserted there did exist a single scheme. The situation then boils down to one where the testimony and the statement cancel each other out and we are left to the record of conviction."

We cannot say that this is a satisfactory application of the rule requiring the Government to establish its case in a deportation proceeding such as this "by clear, unequivocal, and convincing evidence."

We have carefully refrained from making any appraisal of the proofs in this record or giving any indication of the extent to which the petitioner may be entitled to testify with respect to his mental operations. These are matters of law and fact that must be left in the first instance to the special inquiry officer and to the Board of Appeals.

Reversed and remanded for further proceedings in accordance with this opinion.

LUMBARD, *Chief Judge* (dissenting):

I dissent and vote to affirm the order of deportation. The evidence is so "clear, unequivocal and convincing" in this case, that I see no useful purpose in remanding. The majority readily admits, and I do not see how one could deny, that the record of the convictions coupled with Nason's admissions at the preliminary hearing was sufficient to warrant a finding that the two crimes did not arise "out

of a single scheme of criminal misconduct'' by any standard. But because the witness later reversed himself ''under leading questioning of [his] counsel and asserted there did exist a single scheme,'' my brothers remand.

It seems clear to me that the Board of Appeals did decide the issues on the evidence from the record as a whole, and that it decided that, at very best, Nason's testimony was inconsistent and patently unreliable. The Board chose not to rely on Nason's damaging admissions, upon which it might have placed considerable weight. Its views was simply that the record of the two separate and distinct mail frauds, committed over ten months apart, was sufficient evidence upon which to base its finding. I agree.

Here no testimony could support the claim that these two felonies, so removed in time, and void of any conceivable continuity, compare e.g., *Barrese* v. *Ryan,* 203 F. Supp. 880, 883 (D. Conn. 1962), could have arisen out of a ''single scheme'' as Congress intended that phrase.

The evidence was clear, unequivocal and convincing as a matter of law. It serves no purpose for us to remand so that the Board can do again, by merely repeating the formula set forth in the Court's opinion, what it has already done and what it must obviously do again.